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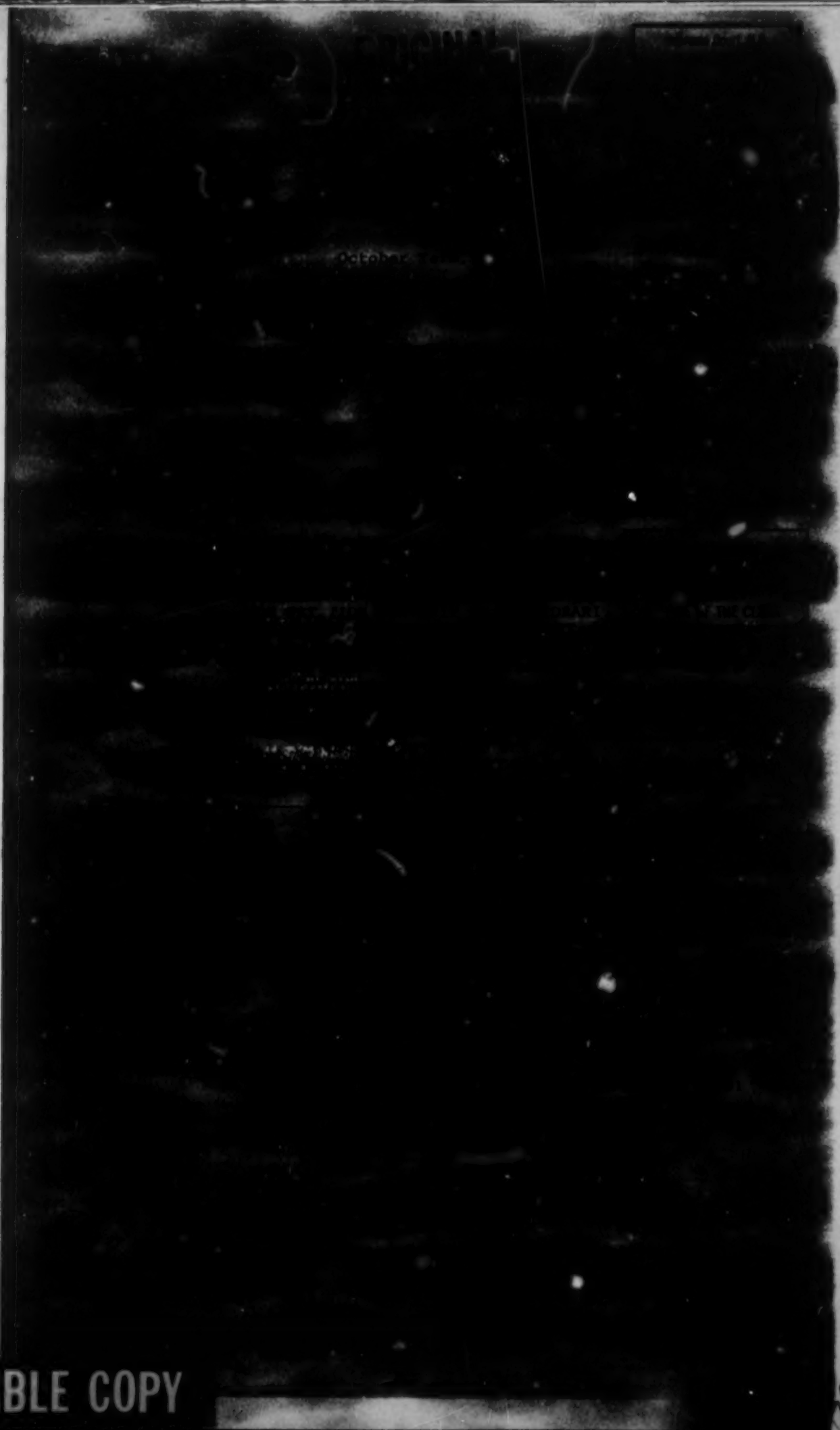

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QUESTIONS PRESENTED

I.

WHETHER ARKANSAS' CAPITAL SENTENCING PROCEDURE IS SUFFICIENT TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY DESPITE THE ABSENCE OF A MANDATORY DIRECT APPEAL TO THE ARKANSAS SUPREME COURT.

II.

WHETHER A THIRD PARTY, NOT OTHERWISE CONNECTED WITH THE CASE, MAY PROSECUTE A DIRECT APPEAL TO A STATE APPELLATE COURT IN A DEATH PENALTY CASE AS NEXT FRIEND OF A MENTALLY COMPETENT DEFENDANT.

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JURISDICTION

Respondent submits that this Court has no jurisdiction pursuant to 28 U.S.C. § 1257(3) to issue a writ of certiorari in the instant case because Whitmore lacks standing to assert the right of Ronald Gene Simmons to a direct appeal to the Arkansas Supreme Court of his capital murder conviction and sentence of death.

NO. 88-7146

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JONAS H. WHITMORE,
INDIVIDUALLY AND AS NEXT FRIEND
OF RONALD GENE SIMMONS — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

The State of Arkansas, the respondent herein, opposes the petition of Jonas Whitmore requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court denying his motion to intervene as next friend of Ronald Gene Simmons.

OPINIONS BELOW

Before the Arkansas Supreme Court, petitioner Jonas Whitmore attempted to intervene in a petition filed by Ronald Gene Simmons in which Simmons requested expedited review of his waiver of a direct appeal of his capital murder conviction and death sentence. The Arkansas Supreme Court denied Whitmore's motion to intervene in Simmons v. State, 298 Ark. 255, 766 S.W.2d 423 (1989). The Arkansas Supreme Court affirmed Ronald Gene Simmons' waiver of his right to a direct appeal to that court in Simmons v. State, 298 Ark. 193, 766 S.w.2d 422 (1989).

STATEMENT OF THE CASE

On December 28, 1987 Ronald Gene Simmons went on a murderous rampage in the town of Russellville, Arkansas. Within approximately 30 minutes, at four different locations in Russellville, Simmons shot at six people with a .22 caliber pistol. Of these six intended victims, Simmons actually shot five, of whom two died as a result of their wounds. After Russellville police officers arrested Simmons, the Pope County Sheriff's Department searched Simmons' house, located at Dover, Arkansas, on the afternoon of December 28 and continued to search on the next day, December 29. In the course of this search, the deputy sheriffs discovered the bodies of sixteen members of Simmons' family. All had been murdered. Five of the victims were found in Simmons' house. Seven were buried in a shallow grave near the house. Two victims, infants, were found in the trunks of two junk automobiles located near the house.

On the basis of all these killings, the State of Arkansas filed two sets of criminal charges against Simmons. Simmons was tried for the Russellville crimes in May of 1988 in Franklin County Circuit Court (hereinafter Simmons I). Subsequently, in February of 1989, Simmons was tried in Johnson County Circuit Court for the murders of the sixteen members of his family whose bodies were discovered on December 28-29 (hereinafter Simmons II). The result of both trials was the same. A jury found Simmons guilty of capital murder and sentenced him to die.

With respect to Simmons I, Simmons made known to the trial court that he did not wish to directly appeal to the Arkansas Supreme Court the validity of his convictions for capital murder and attempted capital murder. On May 16, 1988 the Franklin County Circuit Court heard expert testimony concerning Simmons' mental competence to make a voluntary waiver of his right to a direct appeal to the

Arkansas Supreme Court. After hearing this expert testimony, the trial court found that Simmons was sufficiently mental competent to voluntarily waive his right to a direct appeal. The correctness of this finding of fact by the Franklin County Circuit Court was challenged by Rev. Louis Franz, who filed with the trial court a petition requesting permission to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court as Simmons' next friend. Reverend Franz had no connection to Simmons or to the crimes that were the subject of Simmons I. Reverend Franz simply appointed himself the champion of Simmons' right to a direct appeal and then interjected himself into Simmons I. On December 17, 1988 the Franklin County Circuit Court held a second hearing in order to determine Simmons' mental competence to waive a direct appeal to the Arkansas Supreme Court. After hearing additional expert testimony at this hearing, the Franklin County Circuit Court found that Simmons was sufficiently mental competent to waive his right to a direct appeal to the Arkansas Supreme Court.

Reverend Franz carried his fight to intervene in Simmons I on behalf of Simmons as next friend to the Arkansas Supreme Court. On June 20, 1988, at the request of Reverend Franz, the Arkansas Supreme Court stayed Simmons' execution and ordered Franz and the State to submit briefs addressing three issues: (1) whether there should be a mandatory direct appeal to the Arkansas Supreme Court in death penalty cases; (2) whether Reverend Franz had standing to assert Simmons' alleged right to a direct appeal to the Arkansas Supreme Court; and (3) whether Simmons was sufficiently mentally competent to make a voluntary waiver of his right to a direct appeal to the Arkansas Supreme Court. Franz v. State, 296 Ark. 111, 751 S.W.2d 355 (1988). After reviewing the briefs submitted by the parties and transcripts of these two competency hearings that were held by the Franklin County Circuit Court, the Arkansas Supreme Court issued an

opinion in which it held that Reverend Franz did not have standing to assert, as next friend, Simmons' right to a direct appeal to the Arkansas Supreme Court and that neither the Eighth Amendment to the United States Constitution nor any Arkansas case law or rule of procedure required that there must be a direct appeal in a case where a defendant has received the death penalty. Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

After this loss at the Arkansas Supreme Court, Franz next tried the United States District Court for the Eastern District of Arkansas as a forum from which he could intervene in Simmons I to force a direct appeal on Simmons. The United States District Court for the Eastern District of Arkansas ordered yet additional briefs, had Simmons examined at the Medical Center for Federal Prisoners in Springfield, Missouri, and had an independent counsel prepare a lengthy report in order to advise Simmons as to whether there were any reversible errors that occurred in Simmons I. The District Court eventually held that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Suprme Court and, therefore, Reverend Franz had no standing as next friend to assert Simmons' right to a direct appeal. Franz v. Lockhart, 700 F.Supp. 1005 (E.D. Ark. 1988). In Franz the District Court also held that the Eighth Amendment to the United States Constitution requires that there be at least one review by an appellate court before a state may impose on a defendant the penalty of death. Franz has appealed to the United States Eighth Circuit Court of Appeals the District Court's denial of his petition seeking a writ of habeas corpus as next friend of Simmons and this appeal has been stayed pending the resolution of the instant petition to this Court.

With respect to Simmons II (the instant case), on March 1, 1989 the Johnson County Circuit Court held an evidentiary hearing in order to determine whether Simmons

was sufficiently mentally competent in order to waive his right to a direct appeal to the Arkansas Supreme Court of his conviction of capital murder and death sentence for killing 16 members of his family. The Johnson County Circuit Court reviewed the information in its file from Simmons I concerning Simmons' mental competence, heard additional testimony from Simmons and then found that Simmoms was sufficiently mentally competent in order to waive his right to a direct appeal. The Arkansas Supreme Court affirmed this finding of fact on March 10, 1989 in Simmons v. State, 298 Ark. 193, 766 S.W.2d 422 (1989). Three days later, on March 13, 1989, Jonas Whitmore, petitioner in the instant case, filed a motion to intervene in Simmons II with the Arkansas Supreme Court. The Arkansas Supreme Court denied Whitmore's motion to intervene on the same day in Simmons v. State, 298 Ark. 255, 766 S.W.2d 423. At this point, the death sentence that Simmons had received in Simons II was to be carried out on March 15, 1989. After the Arkansas Supreme Court denied his motion to intervene, Whitmore petitioned this Court, as next friend of Ronald Gene Simmons, to stay the March 15, 1989 execution. In an order dated March 15, 1989 this Court did stay the execution that had been set for March 15, 1989 and ordered that the stay remain in effect pending Whitmore's filing of a petition seeking a writ of certiorari to the Arkansas Supreme Court. The instant brief is filed with this Court in opposition to Whitmore's petition for a writ of certiorari to the Arkansas Supreme Court.

I.

THIS COURT SHOULD DENY PETITIONER WHITMORE'S PETITION FOR WRIT OF CERTIORARI BECAUSE ARKANSAS' CAPITAL SENTENCING PROCEDURE IS SUFFICIENT TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY DESPITE THE ABSENCE OF A MANDATORY DIRECT APPEAL TO THE ARKANSAS SUPREME COURT.

According to petitioner Whitmore, the substantive issue presented in this case is whether the Eighth Amendment's prohibition against cruel and unusual punishment mandates a direct appeal of all capital murder convictions and resulting death sentences.[1] Respondent, the State of Arkansas, disagrees with Whitmore's framing of the issue. The issue presented in this case is not whether, as an abstract matter, the Eighth Amendment requires a direct appeal of all capital murder convictions and resulting death sentences. The issue, properly framed, is whether Arkansas' capital sentence procedure is so deficient that a mandatory direct appeal to the Arkansas Supreme Court is necessary to prevent the arbitrary, capricious imposition of death sentences by Arkansas juries following Arkansas' capital sentencing procedure. Arkansas' capital sentencing procedure, taken as a distinct whole, must be examined in order to determine if the Eighth Amendment requires that Arkansas' death penalty sentencing procedure have the feature of a mandatory direct appeal to the Arkansas Supreme Court. See Pulley v. Harris, 465 U.S. 37, 45 (1984) and Gregg v. Georgia, 428 U.S. 153, 195 (1976). According to this Court's opinions in Gregg and Pulley, Arkansas' capital sentencing procedure is not necessarily violative of the Eighth Amendment because it lacks the feature of a mandatory direct appeal. What the Eighth Amendment requires is not an appeal for the sake of the extra measure of reliability in the correctness of a verdict and sentence that appellate

[1] The due process clause of the Fourteenth Amendment incorporates the Eighth Amendment's prohibition against cruel and unusual punishment; therefore, the Eighth Amendment's prohibition is obligatory on the fifty states. Robinson v. California, 370 U.S. 660 (1962).

review provides, but that a defendant be sentenced to death in a manner that is not irrational, arbitrary or capricious. Pulley at 54. In this regard, it is important to note that this Court has recognized that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." Pulley at 54 and Zant v. Stephens, 462 U.S. 862, 884-85 (1983).

Is Arkansas' death penalty sentencing procedure so deficient that the Eighth Amendment prevents the State from accepting an otherwise valid waiver of a right to a direct appeal to the Arkansas Supreme Court by a defendant who has been sentenced to die by an Arkansas jury?[2] The two lower courts that have considered this issue have disagreed. In Collins v. State, 261 Ark. 195, 203-11, 548 S.W.2d 106, 111-15, cert. denied, 434 U.S. 678 (1977) and again in Franz v. State, 296 Ark. 181, 186-88, 754 S.W.2d 839, 842-43 (1988) (Simmons I) the Arkansas Supreme Court held that the absence of a mandatory direct appeal was not a "make or break" feature of Arkansas' death penalty sentencing procedure. The United States District Court for the Eastern District of Arkansas reached the opposite conclusion in Franz v. Lockhart, 700 F.Supp. 1005, 1014-24 (1988) (Simmons I). Study of Collins and Ark. Code Ann. §§ 5-4-601-07 reveals the following features of Arkansas' death penalty sentencing procedure that prohibit Arkansas juries from

[2]Arkansas' death penalty sentencing procedure is set forth in Ark. Code Ann. §§ 5-4-601-07 (1987). Aside from the absence of a mandatory appeal, Arkansas' death penalty sentencing procedure is virtually identical to the state procedures that were approved by this Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976). In addition, pursuant to Arkansas Rule of Criminal Procedure 36.24, Ark. Sup. Ct. Rule 11(f) and Ark. Code Ann. § 16-91-113(a) (1987), once a capital murder conviction and sentence are appealed to the Arkansas Supreme Court the court will review all of the trial court's rulings that were adverse to the defendant whether or not the defendant advances the adverse ruling as an issue on appeal. This comprehensive review by the Arkansas Supreme Court is not, however, a review for plain error. See Parker v. State, 292 Ark. 421, 436, 731 S.W.2d 756, 764 (1987) and Fretwell v. State, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986).

imposing a death sentence in a way that is fundamentally arbitrary and capricious: (1) in a separate sentencing hearing the jury must unanimously find that at least one of eight statutory aggravating circumstances exists beyond a reasonable doubt; (2) the jury must find that the aggravating circumstance or circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; (3) the jury must find that the aggravating circumstance or circumstances must justify a sentence of death beyond a reasonable doubt; (4) the aggravating circumstances themselves have been approved by this Court in Gregg, supra and Proffitt, supra; (5) the defendant is permitted to offer to the jury a very wide range of evidence in mitigation (see, e.g., Pickens v. State, 292 Ark. 362, 730 S.W.2d 230, cert. denied sub nom., Arkansas v. Pickens, 108 S. Ct. 269 (1987) (on resentencing, defendant may offer as mitigation proof of his good behavior on death row)); (6) the definition of capital murder in Ark. Code Ann. § 5-10-101 (1987) is limited to seven kinds of felony murder and murder committed with a premeditated and deliberated mental state;[1] (7) the trial court has the authority, in its discretion, to reduce a death sentence to life imprisonment. These features of the Arkansas' death penalty sentencing process, when considered as a whole, insure that defendants will not be sentenced to death by Arkansas juries in a manner that is fundamentally arbitrary or capricious.

Respondent the State of Arkansas acknowledges that the opinion of the United States District Court in Franz v. Lockhart, supra, is correct insofar as it holds that the feature of a mandatory direct appeal will provide an additional measure of reliability with respect to the imposition of a death sentence only on defendants who truly

[1]Arkansas has recently amended its definition of capital murder to add single-victim killings done with premeditation and deliberation. See 1989 Ark. Acts No. 856. This amendment becomes effective on July 2, 1989.

deserve to die as punishment for murder. See Franz v. Lockhart at 1022; see also Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology 860, 895-908 (1983). The short answer to the District Court's conclusion that Arkansas' death penalty sentencing process violates the Eight Amendment because it lacks the feature of a mandatory appeal is that this Court has never interpreted the Eighth Amendment to require meticulous, computer-like exactitude in the imposition of the death penalty. See Pulley v. Harris, 465 U.S. 37, 54 (1984). Since its landmark decision in Furman v. Georgia, 408 U.S. 238 (1972) this Court has interpreted the Eighth Amendment to require only that death sentences not be imposed in a manner that is fundamentally arbitrary and capricious. The features of Arkansas' death penalty sentencing procedure noted above ensure that Arkansas juries will not impose death sentences in a manner that is fundamentally arbitrary and capricious. It is true that all the other states that have a death penalty do have some sort of mandatory appellate review, however, this Court has held that the Eighth Amendment does not require absolute symmetry between the states with respect to their death penalty sentencing procedures. See Spaziano v. Florida, 468 U.S. 447, 464 (1984). To put the matter another way, Spaziano holds that a show of hands does not necessarily establish an Eighth Amendment requirement.

II.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI REQUESTED BY WHITMORE BECAUSE WHITMORE LACKS STANDING AND HE CANNOT BE A NEXT FRIEND OF RONALD GENE SIMMONS.

Whitmore asserts that he should have standing as next friend of Ronald Gene Simmons to argue that the Eighth Amendment requires that there be a direct appeal of Simmons' capital murder conviction and death sentence to the Arkansas Supreme Court. The short answer to this assertion by Whitmore is that he has no standing to assert Simmons' right

to a direct appeal as Simmons' next friend. Whitmore has no standing because he cannot satisfy the "case or controversy" requirement of Article III of the United States Constitution and because Whitmore cannot establish that Simmons is not sufficiently mentally competent to waive his right to a direct appeal.

In his petition Whitmore fails to demonstrate that he has any connection to Simmons or to Simmons' case except for the fact that Whitmore, like Simmons, is an inmate on Arkansas' death row.[4] This Court has repeatedly held that third parties, not otherwise connected with a case, who step forward to champion a cause have no standing to assert the legal rights of the genuine parties at interest. See Allen v. Wright, 468 U.S. 737, 754 (1984); O'Shea v. Littleton, 414 U.S. 488, 493-4 (1974); and Tileston v. Ullman, 318 U.S. 44 (1943). Third party "champions" such as Whitmore lack standing because they cannot satisfy the "case or controversy" requirement of Article III of the United States Constitution. This Court had held that would-be plaintiffs have standing to vindicate the rights of genuine parties at interest if: (1) the would-be plaintiff shows that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant; (2) the would-be plaintiff must show that the injury fairly can be traced to the challenged conduct of the defendant; and (3) the would-be plaintiff must show that the injury is likely to be redressed by a favorable decision. See Allen v. Wright, supra; Valley Forge College v. Americans United,

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[4]Whitmore has had a direct appeal, which was unsuccessful, to the Arkansas Supreme Court. Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988). In addition, the Arkansas Supreme Court denied Whitmore post-conviction relief in Whitmore v. State, No. CR87-168 (May 30, 1989). In its Whitmore opinion of May 30, 1989, the Arkansas Supreme Court not only denied Whitmore post-conviction relief but also announced the virtual abolition of state post-conviction relief. The Arkansas Supreme Court's decision to abolish post-conviction relief in Arkansas was prompted, in part, by Whitmore's filing of the instant petition seeking a writ of certiorari with this Court.

454 U.S. 464, 472 (1982); and Baker v. Carr, 369 U.S. 186, 204 (1962); see also 13 Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 3531.9 at 452-56, 567-69 (2d ed. 1984).

In his petition Whitmore fails to explain how it is that he will suffer some actual injury if Simmons' does not challenge the validity of his capital murder conviction and death sentence by filing a direct appeal with the Arkansas Supreme Court. In truth, Whitmore cannot do so. Whitmore has had a direct appeal of his capital murder conviction and death sentence. Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988). Given that Whitmore has had a direct appeal of his capital murder conviction and death sentence, any constitutional defect in Arkansas' death penalty sentencing procedure that exists because of the absence of a mandatory direct appeal to the Arkansas Supreme Court will have no effect on Whitmore. In his direct appeal to the Arkansas Supreme Court, that court did apply Arkansas Rule of Criminal Procedure 11(f). This state rule of criminal procedure requires that the Arkansas Supreme Court examine the entire record of the appellant's trial to make sure that all rulings by the state trial court that were adverse to the appellant were not so prejudicial that they would require reversal of the appellant's conviction or sentence. Because the Arkansas Supreme Court did apply Rule 11(f) to the record of Whitmore's state trial, he would suffer no prejudice if the Arkansas Supreme Court did not apply Rule 11(f) to Simmons because Simmons failed to file a direct appeal with the Arkansas Supreme Court.

In addition, Whitmore's claim that the robbery/murder that he committed will not seem so bad, by way of comparative review by the Arkansas Supreme Court, to the murders that Simmons committed is, by the terms of Whitmore's petition, entirely speculative. Whitmore's argument in this regard depends upon his capital murder conviction and death sentence, which the Arkansas Supreme

Court has already affirmed, being reversed and remanded at some indefinite period in the future by some state or federal court. Whitmore has completely failed to allege in his petition that there is even a remote possibility that his own conviction and sentence will be reversed. It is only if Whitmore's sentence and conviction are reversed that he would be able to minimize the reprehensibility of the murder that he committed by comparing it to the murders that Simmons committed. Until Whitmore can demonstrate some possibility that his conviction or sentence could be reversed and that he could face the death penalty a second time, his "compared-to-Simmons-I-dont't-look-so-bad" argument is too speculative to warrant the conclusion that Whitmore will suffer an irreparable injury if the Arkansas Supreme Court does not review Simmons' conviction and sentence.

Whitmore could evade the Article III bar to his championing of Simmons' right to a direct appeal if Whitmore could demonstrate that he was Simmons' next friend.[1] In order to establish his status as Simmons' next friend, Whitmore must show that he has some relationship with Simmons beyond that of uninvited intruder and Whitmore must also establish that Simmons is not sufficiently mentally competent to voluntarily waive his right to a direct appeal to the Arkansas Supreme Court. See Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989); Smith v. Armontrout, 812 F.2d 1050, 1053 (8th Cir), cert. denied, 107 S. Ct. 3277 (1987); and Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology 860, 909 n.211 (1983). This Court has repeatedly held that would-be next friends cannot assert the rights of a defendant if the defendant is sufficiently mentally competent to decide himself whether he

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[1]Petitions seeking relief pursuant to 28 U.S.C. § 2254 may be filed by a "next friend." 28 U.S.C. § 2242.

will assert his rights. Gilmore v. Utah, 429 U.S. 1012 (1977) and Rosenberg v. United States, 346 U.S. 273, 291 (1953). A record of Simmons' mental competence was extensively developed in Simmons I and was reviewed by the state trial court and by the Arkansas Supreme Court in the instant case, which is Simmons II. The state trial court, the Arkansas Supreme Court and the United States District Court for the Eastern District of Arkansas have all held that Simmons was mentally competent and not, therefore, in need of a next friend. (The United States District Court for the Eastern District of Arkansas reached this decision with respect to Simmons I). The Arkansas courts' finding of fact that Simmons is sufficiently mentally competent to voluntarily waive his right to a direct appeal is entitled to the presumption of correctness set forth in 28 U.S.C. § 2254(d). See Maggio v. Fulford, 462 U.S. 111 (1983) and Franz v. Lockhart, 700 F.Supp. 1005, 1025 (E.D. Ark. 1988). Whitmore fails to assert in his petition that Simmons is presently incompetent. Because Whitmore has failed to demonstrate even a slight possibility that Simmons is presently incompetent, Whitmore cannot assert Simmons' right to a direct appeal as Simmons' next friend. In this respect, the instant case is identical to Gilmore, supra, and should be controlled by it.

CONCLUSION

For the reasons noted above, respondent, the State of Arkansas, respectfully requests that this Court deny petitioner Whitmore's petition requesting a writ of certiorari to the Arkansas Supreme Court.